

DEPARTMENT OF HEALTH AND MENTAL HYGIENE

BOARD OF HEALTH

NOTICE OF ADOPTION
OF A PROPOSAL TO REPEAL ARTICLE 7 AND
AMEND ARTICLES 1, 3, 47 AND 151
OF THE NEW YORK CITY HEALTH CODE

In compliance with §1043(b) of the New York City Charter (the “Charter”) and pursuant to the authority granted to the Board of Health by §558 of such Charter, a notice of intention to repeal Article 7 (Administrative Tribunal) and amend Articles 1, 3, 47 and 151 of the New York City Health Code (the “Health Code”) was published in the City Record on September 21, 2011, and a public hearing was held on October 26, 2011. No comments or testimony were received at or after the hearing. At its meeting on December 13, 2011, the Board of Health adopted the following resolution.

Statement of Basis and Purpose

Statutory Authority

These amendments to the New York City Health Code (the “Health Code”) are issued in accordance with §§556, 558 and 1043 of the New York City Charter (the “Charter”). Section 556 of the Charter provides the Department of Health and Mental Hygiene (the “Department”) with authority to regulate all matters affecting health in the city of New York. Section 558(b) and (c) of the Charter empower the Board of Health (the “Board”) to amend the Health Code and to include in the Health Code all matters over which the Department has authority. Section 1043 of the Charter gives the Department rulemaking powers. These amendments are also promulgated pursuant to revisions to the Charter approved by the voters in 2010, authorizing the Mayor by Executive Order to consolidate certain administrative tribunals by transferring their adjudicatory functions to the Office of Administrative Trials and Hearings (OATH).

Basis and Purpose of the Rule Change

On November 2, 2010, New York City voters approved Charter revisions authorizing the Mayor, by Executive Order, to consolidate certain administrative tribunals into OATH. By Executive Order No. 148 (June 8, 2011) (the “Executive Order”), the Mayor ordered the “transfer of the administrative tribunals [*sic*] established by the Board of Health pursuant to Section 558 of the Charter” to OATH, effective July 3, 2011. The Executive Order further provided that certain provisions of the Health Code and other Rules of the City of New York pertaining to the Department’s Administrative Tribunal, as well as some additional interim procedures, would be deemed rules of OATH in accordance with the Report and the Appendix to the Report of the Committee on Consolidation of Administrative Tribunals (“Mayor’s Committee”) until OATH itself completed rulemaking in accordance with the Charter.

At its meeting on June 14, 2011, the Board of Health adopted a resolution facilitating the transfer by designating the Administrative Tribunal as the “Health Tribunal at OATH, which shall decide questions of fact and law and penalties to be imposed in all matters brought before such Administrative Tribunal...”

To further facilitate a smooth transition of adjudicatory and appeals functions to the Health Tribunal at OATH, the Board has repealed Article 7 and amended other provisions of the

Health Code that refer to either or both Article 7 and the Administrative Tribunal, to be consistent with the Executive Order and Report and Appendix of the Mayor's Committee. Those provisions of Article 7 that survive the transfer to OATH have been added to Article 3. In addition, certain provisions of the Department's rules in Chapter 7 of Title 24 of the Rules of the City of New York ("RCNY"), which differentiated matters previously assigned to the Administrative Tribunal (penalties and fines) and OATH (show cause, permit revocations and suspensions) have also been incorporated in Article 3. In a separate rulemaking process that does not require Board of Health approval, the Department will take necessary actions to repeal Chapter 7 of Title 24 RCNY and Chapter 1 of Title 25 RCNY (Adjudications of the former Department of Mental Health and Retardation).

The following is a summary of the amendments that have been adopted:

Article 1 (Short Title and General Definitions). Section 1.03 (b), defining the Administrative Tribunal, has been amended by identifying the new Health Tribunal at OATH. A new subdivision (k) has been added that references and defines OATH.

Article 3 (General Provisions). Section 3.11 (c) (which provided that when a respondent fails to appear at the Administrative Tribunal and is found in default, any penalty imposed shall be double that which would have been imposed if the respondent was found in violation after a hearing) has been amended to reference the new name of the tribunal and add provisions recommended by Mayor's Committee relating to the name of the tribunal (former §7.01); jurisdiction (former §7.03); and surviving provisions of Chapter 7 of Title 24 RCNY. Section 3.12 continues the tribunal created by the Board of Health, but transfers its operation to OATH.

Article 47 (Child Care Services). Section 47.77 (h), referring to the authority of the Department to issue notices of violation pursuant to Article 7, has been amended by changing the reference to Article 7 of the Health Code..

Article 151 (Pest Prevention and Management). Section 151.05 (a), which authorizes the Environmental Control Board in addition to the Administrative Tribunal to adjudicate notices of violation, has been amended to refer to the Health Tribunal at OATH.

Article 5 (General Permit Provisions) and Article 81 (Food Preparation and Food Establishments). Changes in the text of these two articles that reference Article 7 and the Administrative Tribunal have been incorporated into the resolutions adopting comprehensive amendments of these articles.

Statement Pursuant to Charter § 1043

This proposal was not included in the Department's regulatory agenda because the need for the amendment became known after publication of the regulatory agenda.

The resolution is as follows:

Matter to be deleted is in [brackets]

Matter to be added is underlined.

RESOLVED, that Article 7 (Administrative Tribunal), and the list of section headings in Article 7 of the New York City Health Code, found in Title 24 of the Rules of the City of New

York, be, and the same hereby are, REPEALED, to be printed together with explanatory notes as follows.

Notes: Article 7 was repealed by resolution adopted December 13, 2011. The Administrative Tribunal established pursuant to New York City Charter §558 was transferred to the Office of Administrative Trials and Hearings (OATH), to be known as the Health Tribunal at OATH, by Executive Order No. 148, effective July 3, 2011. The Board of Health adopted a resolution on June 14, 2011 to facilitate the transfer that authorized the Health Tribunal at OATH to decide questions of fact and law in any proceeding alleging a violation of the Health Code.

RESOLVED, that subdivision (b) of §1.03 (General definitions) of Article 1 (Short Title and Definitions) of the New York City Health Code, found in Title 24 of the Rules of the City of New York, be, and the same hereby is amended, and a new subdivision (k) added, to be printed together with explanatory notes as follows.

§1.03 General definitions.

When used in the New York City Health Code:

* * *

(b) *Administrative Tribunal* means the [Administrative Tribunal of the Department of Health and Mental Hygiene of the city of New York] Health Tribunal at OATH.

* * *

(j) *State* means the state of New York.

(k) OATH means the Office of Administrative Trials and Hearings.

Notes: Section 1.03 was amended by resolution adopted December 13, 2011, amending the definition of the Administrative Tribunal, and adding a definition for OATH, in accordance with the Mayor's Executive Order No. 148 (June 8, 2011) which consolidated the Department's Administrative Tribunal and other City agencies' tribunals with OATH as a result of a 2010 Charter revision.

RESOLVED, that subdivision (c) of §3.11 (Civil enforcement of the Code) of Article 3 (General Provisions) of the New York City Health Code, found in Title 24 of the Rules of the City of New York, be, and the same hereby is amended, and new subdivisions (d) and (e) added, to be printed together with explanatory notes as follows:

§3.11 Civil Enforcement of the Code

* * *

(c) Where a person fails to appear [in a proceeding] at an adjudicatory hearing to determine whether a monetary penalty should be imposed for any violation of this Code, [brought pursuant to Article 7 of this Code] the penalties imposed for each sustained violation shall be double the amount that would otherwise be assessed by the [hearing examiner] administrative law judge, but shall not exceed the maximum penalty specified in subdivisions (a) or (b) of this [Section, or in the other applicable law or regulation] section.

Notes: Subdivision (c) of §3.11 was amended by resolution adopted December 13, 2011, to delete a reference to matters brought pursuant to Article 7 (Administrative Tribunal), in accordance with the Mayor's Executive Order No. 148 (June 8, 2011) which consolidated the Department's Administrative Tribunal and other City agencies' tribunals with OATH as a result of a 2010 Charter revision.

RESOLVED, that Article 3 (General Provisions) of the New York City Health Code, found in Title 24 of the Rules of the City of New York, be, and the same hereby is amended, and a new section 3.12 added, to be printed together with explanatory notes as follows:

§3.12 Administrative Tribunal

(a) The Administrative Tribunal established by the Board of Health pursuant to §558 of the Charter is hereby continued. It shall be operated by and within the City's Office of Administrative Trials and Hearings and known as the Health Tribunal at OATH.

(b) Where the Department seeks a fine or monetary penalty for a violation of this Code or any other State or local law or regulation enforced by the Department, it shall bring a proceeding at either the Health Tribunal at OATH or at the Environmental Control Board, and such proceedings shall be governed by the procedures of such Tribunal or Board, as the case may be. The decisions of the Environmental Control Board shall be final; the decisions of the Health Tribunal at Oath shall be final, except in the case of any appeal from an adjudication of a violation of Article 13-E of the Public Health Law.

(c) Where there is an appeal from an adjudication of a violation of Article 13-E of the Public Health Law, the Health Tribunal at OATH shall, pursuant to the applicable provision of the rules of OATH governing such Tribunal, issue a recommended decision to the Commissioner for him or her to review. Within thirty (30) days of the issuance of the recommendation, the respondent may submit to the Department a written argument why the decision should or should not be followed by mailing by certified or registered mail, emailing or delivering by hand a copy of the argument to the General Counsel of the Department. After the Department has received the respondent's argument or after forty-five (45) days have passed from when the Tribunal issued its recommended decision, whichever time is shorter, the Commissioner shall issue a written

decision affirming, reversing or modifying the recommended decision, or remanding the appeal back to the Health Tribunal at OATH for further proceedings. The Commissioner's decision shall be served on the respondent by certified or registered mail. Where appropriate, the Commissioner's decision shall order the Tribunal to repay the respondent any penalty that has been paid. Except when the Commissioner remands an appeal to the Health Tribunal at OATH for future proceedings, the Commissioner's decision shall constitute a final agency determination.

Notes: Section §3.12 was added by resolution adopted December 13, 2011, reflecting the transfer of the form Department Administrative Tribunal to OATH, in accordance with the Mayor's Executive Order No. 148 (June 8, 2011).

RESOLVED, that subdivision (h) of §47.77 (Closing and enforcement) of Article 47 (Child Care Services) of the New York City Health Code, found in Title 24 of the Rules of the City of New York, be, and the same hereby is amended, to be printed together with explanatory notes to read as follows:

§47.77 Closing and enforcement.

* * *

(h) Department authority not limited by this section. Nothing herein shall be construed to limit the authority of the Department to issue notices of violation [pursuant to Article 7 of this Code] or commence any other proceeding or action provided for by this Code or other applicable law, including actions to deny, suspend or revoke permits.

Notes: Subdivision (h) was amended by resolution adopted December 13, 2011 to reflect the repeal of Article 7, and the transfer of the Department's Administrative Tribunal to OATH, in accordance with Mayor's Executive Order No. 148 (June 8, 2011).

RESOLVED, that §151.05 (Notices of violation) of Article 151 of the New York City Health Code, found in Title 24 of the Rules of the City of New York, be, and the same hereby is amended, to be printed together with explanatory notes to read as follows:

§151.05 Notices of violation.

(a) *Designation of Environmental Control Board.* In accordance with §1049-a (c)(2) of the Charter, a notice of violation ("NOV") citing a violation of any provision of this Article may be made returnable to the Environmental Control Board in addition to the [Administrative Tribunal established pursuant to Article 7 of this Code] Health Tribunal at OATH.

* * *

Notes: Subdivision (a) of §151.05 was amended by resolution adopted XXX to reflect the transfer of the former Department Administrative Tribunal to OATH, in accordance with the Mayor's Executive Order No. 148 (June 8, 2011).

RESOLVED, that the list of articles in Title I (Short Title, Definitions and General Provisions) of the New York City Health Code, found in Title 24 of the Rules of the City of New York be, and the same hereby is, amended, to be printed together with explanatory notes to read as follows:

NEW YORK CITY HEALTH CODE
TITLE I
SHORT TITLE, DEFINITIONS AND GENERAL PROVISIONS

- Article 1 Short Title and General Definitions
- 3 General Provisions
- 5 General Permit Provisions
- [7 Administrative Tribunal]
- 9 Petitioning the Board of Health to Commence Rulemaking

Notes: The list of Articles in Title I was amended by resolution adopted December 13, 2011 to reflect the transfer of the former Department Administrative Tribunal to OATH, in accordance with the Mayor's Executive Order No. 148 (June 8, 2011), with the repeal of Article 7 effective upon the effective date of amendments to the rules of OATH codifying the procedures applicable to the Health Tribunal at OATH.

RESOLVED, that the amendments adopted herein shall in no event take effect earlier than the effective date of amendments to the rules of OATH codifying the procedures applicable to the Health Tribunal at OATH.